Alan C. Stephens, Esq., ISB #2325
THOMSEN STEPHENS LAW OFFICES
2635 Channing Way
Idaho Falls, ID 83404
Telephone (208) 522-1230
Fax (208) 522-1277

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

BROOK NEF, and NEF FLYING SERVICE, INC., an Idaho corporation, Plaintiffs, v. ENGINE COMPONENTS, INC., a foreign corporation; TULSA AIRCRAFT ENGINES, INC., a foreign corporation; AIRCRAFT CYLINDERS OF AMERICA, INC., a foreign corporation, Defendants.	Case No. CIV-04-0362-E-BLW PLAINTIFFS' BRIEF OPPOSING MOTION TO DISMISS AND IN SUPPORT OF MOTION FOR STAY OR DEFER RULING AND FOR ORDER ALLOWING ALLOWING JURISDICTIONAL DISCOVERY

This brief is submitted in opposition to defendant Aircraft Cylinders of America, Inc.'s motion to dismiss for lack of personal jurisdiction and in support of plaintiffs' motion for order staying or deferring ruling and for jurisdictional discovery.

IDAHO LONG-ARM STATUTE

A Federal Court sitting in diversity is bound to follow the Idaho Supreme Court's interpretation of Idaho State law. *State of Idaho v. M.A. Hanna Co.*, 819 Fed.Supp. 1464 (D.Idaho 1993). The Idaho long-arm statute, Idaho Code §5-514, states in relevant part:

> Any person, firm, company, association or corporation, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts hereinafter enumerated, hereby submits said person, firm, company, association or corporation, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of said acts:
>
> (a) the transaction of any business within this state which is hereby defined as a doing of any act for the purpose of realizing pecuniary benefit or accomplishing or attempting to accomplish, transact or enhance the business purpose or objective or any part thereof of such person, firm, company, association or corporation;
>
> (b) the commission of a tortious act within the state; . . .

Idaho courts hold that an allegation that an injury has occurred in Idaho in a tortious manner is sufficient to invoke the tortious act provision of Idaho Code §5-514(b). *St. Alphonsus Regional Medical Center v. State of Washington*, 123 Idaho 739, 852 P.2d 491 (Idaho 1993), *Schneider v. Sverdsten Logging Co.*, 104 Idaho 210, 657 P.2d 1078 (1983). The negligent act does not need to take place in Idaho so long as the injury is alleged to have occurred in Idaho. *Doggett v. Electronics Corp. of America*, 454 P.2d 63, 93 Idaho 26 (Idaho 1969). Whether the conduct is actually tortious is not relevant to a jurisdictional analysis under Idaho's long-arm statute. *St. Alphonsus*, 852 P.2d at 495.

SPECIFIC JURISDICTION

Specific jurisdiction is established if the defendant has such "minimum contacts" with the State of Idaho that it can reasonably anticipate being sued here. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

The Ninth Circuit uses a three-part test to determine if personal jurisdiction exists: (1) the defendant must perform some act or consummate some transaction within the forum or otherwise purposely avail itself of the privileges of conducting activities in the forum; (2) the claim must arise out of or result from the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable. *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223 Fed.3d 1082, 1086 (9th Cir. 2000). Recently the Ninth Circuit has determined that it no longer requires the plaintiff to demonstrate each of the three elements to establish specific jurisdiction. Instead jurisdiction may be established through a lesser showing of minimum contacts if considerations of reasonableness so require. *Ochoa v. J.B. Martin & Sons Farms, Inc.*, 287 F.3d 1182, 1189 n.2. (9th Cir. 2002).

PURPOSEFUL AVAILMENT - STREAM OF COMMERCE

What constitutes purposeful availment in product liability cases has been defined in the case of *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). There United States Supreme Court held that a defendant corporation "purposefully avails" itself of a forum where the defendant places its products into interstate commerce and reasonably foresees that those products will be delivered into that forum.

Aircraft Cylinders of America, Inc., hereafter referred to as "ACA", apparently agrees with the principles set forth by the Idaho Supreme Court in *Doggett v. Electronics Corp. of America*, 93 Idaho 26, 454 P.2d 63 (1969), where the Idaho Supreme Court found that the component parts

manufacturer's placing products in the stream of commerce, even though it had no other contacts with Idaho, was sufficient for Idaho's long-arm statute to obtain jurisdiction. But ACA claims that Idaho does not obtain jurisdiction under the *Doggett* line of cases because ACA is not a "manufacturer." However, Engine Components, Inc. used ACA's Nu-Chrome process as part of the manufacturing process. In other words, the manufacture, construction, production, fabrication, or whatever you want to call the creation of the cylinder, was not complete without the chroming process performed by Nu-Chrome.

ACA is as much a manufacturer as Engine Components, Inc., particularly since it had within its control the cylinder and could have been the entity that caused the defect that led to the cylinder's failure. The statement by ACA that chroming is not part of the manufacturing process makes no sense. Why put the cylinder through the chroming process if it is not part of manufacturing the cylinder? It is not analogous to painting an automobile, as ACA suggests. The Nu-chrome is placed on the cylinder walls hidden from view and is not just a cosmetic coating like the paint on the outside of an automobile. Its apparent purpose is to make the cylinder wall less susceptible to the effects of friction caused by the piston. That is clearly a functional process and an integral part of the manufacturing process, without which the product would not function as advertised.

ACA is correct in its interpretation of *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 107 S.Ct. 1026 (1987), that the Supreme Court was unable to reach a collective decision as to what is required to satisfy the stream of commerce test. Apparently that case resulted in two opinions, one of Justice O'Connor's that seems to require an affirmative act, and that of Justice Brennan's that required no such affirmative act. Plaintiffs suggest that the approach

taken by Justice Brennan is the most equitable and logical. However, under either approach until jurisdictional discovery has taken place it is unfair for plaintiffs to have to meet the affirmations of ACA until those affirmations can be tested.

THE EXERCISE OF JURISDICTION BY AN IDAHO COURT DOES NOT VIOLATE ACA'S RIGHT OF DUE PROCESS

The exercise of jurisdiction by an Idaho court in this case does not offend traditional notions of fair play and substantial justice. The Idaho Supreme Court has pointed out factors that a court should consider in determining whether it is fair to exercise long-arm jurisdiction over a non-resident manufacturer whose product is allegedly involved in a tortious injury in the state. In the case of *Duignan v. A.H. Robbins Co.*, 98 Idaho 134, 559 P.2d 250 (1977) where the court stated:

> First, the court should consider the nature and size of the manufacturer's business. As the probability of a product entering interstate commerce and the size or the volume of the business increase, the fairness of making the manufacturer defend in the plaintiff's forum increases. Second, the court should consider the economic independence of the plaintiff. A poor man . . . may not be able to afford the trip to another jurisdiction to institute suit. . . . Third, the court should consider the nature of the cause of action including the applicable law and the practical matters of trial. As the number of local witnesses increases and their availability to travel decreases, it seems fair to make the manufacturer defend in the plaintiff's forum.

98 Idaho 137-138, 559 P.2d 753-754. Citing *Phillips v. Anchor Hocking Glass*, 100 Ariz. 251, 257, 413 P.2d 732, 738 (1966). Brook Nef has lost his crop dusting business because of the airplane crash caused by a faulty cylinder. Any evidence concerning his business will be in Idaho; his health care is in Idaho. He is not a wealthy man that can travel to a foreign state to prosecute this case.

A Law Review article quoted by the *Duignan* court gives an appropriate rationale for jurisdiction in this case. That article stated:

> It would seem consonant with fairness to subject the manufacturer to jurisdiction whenever his product gave rise to the cause of action within the foreign state, even though the manufacturer had no other contact in the state. As far as the manufacturer's economic objectives are concerned, his overriding purpose is to have his product consumed. Where this consumption occurs is relatively insignificant to him. This observation supports the position that the manufacturer can be summoned to defend a cause of action arising out of the use of his product wherever it may be located. Any inconvenience that may be asserted is more than balanced by his interest in defending the integrity of his product, the maintenance of which may ultimately determine his economic success. There can be no unfairness in forbidding the manufacturer to disassociate himself from his product.

98 Idaho at 138; 559 P.2d at 754 (quoting *In Personam Jurisdiction over Non-Resident Manufacturers in Product Liability Actions,* 63 MICH. L. REV. 1028, 1031-32).

In this particular instance ACA is apparently only one of two companies in the United States that performs the Nu-Chrome process and, therefore, is spreading its product all over the United States and reaping the economic benefit. Even the name it has chosen states that it has the intent to be a nationwide company, providing its product to everyone willing to use it no matter whether that consumer is in Oklahoma, Florida, Alaska or even Idaho. It would be unfair to allow it to reap the economic benefit from its product being used by people and businesses wherever they are in the United States but not have to associate itself with the potential damage its product may cause. When a manufacturer sells its goods to a customer with national presence, it should be prepared to defend itself in any states where the products would be distributed. *See Dillaplane v. Lite Indust., Inc.*, 788 S.W.2d 530, 535 (Mo. Ct. App. 1990). The *Dillaplane* case involved a manufacturer claiming it only sold its products to specifically isolated military depots and challenged jurisdiction, but the court reasoned that the manufacturer knew of the military's practice of distributing the product from its depots to various other bases in other states. The court reasoned that it would be unfair to allow

a manufacturer to reap the benefits of a relationship with a customer that distributes product around in various states without suffering the burdens associated with the benefits.

In order to escape this Court's personal jurisdiction over it, ACA asserts that it did not participate in the manufacture of a product but only applied a process to the product. However, ACA may not defeat personal jurisdiction simply by denying the merits of the underlying claims. When ACA intertwines the jurisdictional issues with the merits, the matter should proceed to trial on the merits. *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285 n.2, (9th Cir. 1977). *See also Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 733 (11th Cir. 1982), in which the court reasoned:

> The Supreme Court has made it clear that in [this] situation no purpose is served by indirectly arguing the merits in the context of federal jurisdiction. Judicial economy is best promoted when the existence of a federal right is directly reached and, where no claim is found to exist, the case is dismissed on the merits. This refusal to treat indirect attacks on the merits as Rule 12(b)(1) motions provides, moreover, a greater level of protection to the plaintiff who in truth is facing a challenge to the validity of his claim: the defendant is forced to proceed under Rule 12(b)(6) (for failure to state a claim upon which relief can be granted) or Rule 56 (summary judgment) — both of which place greater restrictions on the district court's discretion.

Id. at 733 (quoting *Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981)).

STANDARD OF ANALYSIS

If the court determines that it will receive only affidavits or affidavits plus discovery on the issue of personal jurisdiction, these very limitations dictate that a plaintiff need make only a *prima facie* showing of jurisdictional facts through the submitted materials in order to avoid a defendant's motion to dismiss. *Data Disc, Inc. v. Systems Technology Assoc., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977).

The Court must assume the truth of all factual allegations of the complaint. *Potrero Hill Community Action Comm. v. Housing Auth. of City and County of San Francisco*, 410 F.2d 974 (9th Cir. 1969). *See also Alexander v. Circus Circus Enter., Inc.*, 972 F.2d 261, 262 (9th Cir. 1992): "Any greater burden such as proof by a preponderance of the evidence would permit a defendant to obtain a dismissal simply by controverting the facts established by a plaintiff through his own affidavits and supporting materials." *Id.* A plaintiff could not meet a burden of proof requiring a preponderance of the evidence without going beyond the written materials. *Id.* Accordingly, if a plaintiff's proof on the jurisdictional issue is limited to written materials, it is necessary only for these materials to demonstrate facts which support a finding of jurisdiction in order to avoid a motion to dismiss. *Id.*

In determining whether a plaintiff has made a *prima facie* showing of personal jurisdiction under the "effects" test or any other test, conflicts between the parties' affidavits and other discovery materials must be resolved in favor of the plaintiff for purposes of deciding whether a prima facie case for personal jurisdiction exists. *Lake v. Lake*, 817 F.2d at 1420, (9th Cir. 1987). Thus, it is well established that where the issue of personal jurisdiction is limited to written materials, ***the court must adopt plaintiff's version of events as alleged in the written materials.*** *See Dole Food Co. v. Watts*, 303 F.3d at 1108 ("Conflicts between parties over statements contained in affidavits must be resolved in the plaintiff's favor."); *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) ("Because the prima facie jurisdictional analysis requires us to accept the plaintiff's allegations as true, *we must adopt [plaintiff]' s version of events for purposes of this appeal*.") (emphasis added).

Simply put, in ruling upon the defendants' motions to dismiss, the Court "***only inquire[s] into whether [the plaintiff]'s] pleadings and affidavits make a prima facie showing of personal jurisdiction***." *Dole Food Co.,* 303 F.3d at 1108. Any conflict in the parties' allegations must be resolved in Nef's favor.

THIS COURT HAS BROAD DISCRETION TO PERMIT DISCOVERY ON JURISDICTIONAL ISSUES

The Court has broad discretion to permit discovery to aid in determining whether it has in personam jurisdiction. *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n. 24 (9th Cir. 1977) (and numerous cases cited therein); *Data Disc,* 557 F.2d at 1285 n. 1. This power of the Court flows from the fact that "a trial court does have jurisdiction to determine its own jurisdiction." *Wells Fargo*, 556 F.2d at 430 n. 24; *Data Disc,* 557 F.2d at 1285 n. 1. In considering discovery on a motion to dismiss for lack of personal jurisdiction, "Discovery may appropriately be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary." *Data Disc*, 557 F.2d at 1285 n.1; *Wells Fargo*, 556 F.2d at 430 n. 24.

Courts have recognized that facts which would establish personal jurisdiction over the defendant are often in the exclusive control of the defendant, and that it is an abuse of discretion to deny the plaintiff discovery of evidence necessary to reply to the defendant's motion to dismiss for lack of jurisdiction. *See Hansen v. Neumueller GmbH*, 163 F.R.D. 471, 475 (D.Del. 1995); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n. 13, 98 S.Ct. 2380, 2389 n. 13, 57 L.Ed.2d 253 (1977) ("[W]here issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues."); *Fraley v. Chesapeake & Ohio Ry. Co.,* 397 F.2d 1, 3 (3rd Cir.1968)

(district court's refusal to permit discovery in aid of personal jurisdiction improper). *See also, Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727 (11th Cir. 1982) (holding that trial court erred in dismissing for lack of subject matter jurisdiction without allowing plaintiff any discovery to establish jurisdiction); *Blanco v. Carigulf Lines*, 632 F.2d 656 (5th Cir. 1980) ("the rules entitle a plaintiff to elicit material through discovery before a claim may be dismissed for lack of jurisdiction."); *Chatham Condo. Ass'ns. v. Century Village, Inc.*, 597 F.2d 1002, 1012 (5th Cir. 1979) ("dismissal for lack of subject matter jurisdiction prior to trial, and certainly prior to giving the plaintiff ample opportunity for discovery should be granted sparingly"); *Williamson v. Tucker*, 645 F.2d 404, 414 (5th Cir.) *cert. Denied*, 454 U.S. 897, 102 S.Ct. 396 (1980) (prior to 12(b)(1) dismissal when jurisdictional facts are in dispute, "the district court must give the plaintiff an opportunity for discovery and for a hearing that is appropriate to the nature of the motion to dismiss. Thus, some courts have refused to grant such a motion before plaintiff has had a chance to discover facts necessary to establish jurisdiction.").

Where the jurisdictional facts are intertwined with the merits, a decision on the jurisdictional issues is dependent on a decision of the merits. In such a case, "it is preferable that this determination be made at trial, where a plaintiff may present his case in a coherent, orderly fashion and without the risk of prejudicing his case on the merits. *Data Disc*, 557 F.2d at 1285 n.2 (citations omitted). *See also Eaton*, 692 F.2d at 733 (citing numerous cases). Accordingly, where the jurisdictional facts are enmeshed with the merits, the district court may decide that the plaintiff need only establish a prima facie showing of jurisdictional facts with affidavits and perhaps discovery materials. *Id.* (citations omitted).

If this Court believes the evidence may not be sufficient for a prima facie showing of personal jurisdiction or general jurisdiction as to Aircraft Cylinders of America, Inc., plaintiffs request they be allowed to conduct discovery aimed at jurisdiction issues prior to this court ruling on defendant's motion. A denial of personal jurisdiction at this juncture would necessarily be based upon incomplete facts. For example, sales activities, contracts and the presence of the defendants' agents in Idaho are important factors in establishing personal jurisdiction. However, in support of its motion the defendant offers the assertion that it does no business in Idaho and that it "never contemplated" that applying the Nu-Chrome process to cylinders owned by others that it might be subject to suit in any state other than Oklahoma. (*See* Affidavit of Rama Palepu , ¶ 4,5, 6 & 11). This, and other crucial information, is almost exclusively within defendant's control. Plaintiffs should not be forced to accept the unsupported allegations of defendant (whatever they mean) without the benefit of discovery to contest the motion.

Consequently, in the event the Court believes that the evidence may not be sufficient to exercise personal jurisdiction over all defendants, plaintiffs have requested leave to conduct jurisdictional discovery to explore the extent to defendant's contacts with Idaho and states other than Oklahoma.

CONCLUSION

Plaintiffs have set forth a prima facie case for personal jurisdiction in the Idaho courts and the motion to dismiss should be denied. If the Court feels that a prima facie case is not evident, then it should defer ruling on the motion to dismiss and grant plaintiffs' motion to allow for jurisdictional discovery to occur to properly explore the jurisdictional issues.

DATED this ____ day of September, 2004.

THOMSEN STEPHENS LAW OFFICES, P.L.L.C.

By: _____
Alan C. Stephens, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 21st day of September, 2004, I caused a true and correct copy of the foregoing PLAINTIFFS' BRIEF OPPOSING MOTION TO DISMISS AND IN SUPPORT OF MOTION FOR STAY OR DEFER RULING AND FOR ORDER ALLOWING JURISDICTIONAL DISCOVERY to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

HOWARD D BURNETT HAWLEY TROXELL ENNIS & HAWLEY PO BOX 100 POCATELLO ID 83204 (Engine Components)	[X] Mail [ ] Hand Delivery [ ] Facsimile
MARK S GESTON L JEFF SEVERSON STOEL RIVES LLP 101 S CAPITOL BLVD STE 1900 BOISE ID 83702 (Tulsa Aircraft)	[X] Mail [ ] Hand Delivery [ ] Facsimile
THAD T DAMERIS PILLSBURY WINTHROP LLP 909 FANNIN 22ND FLOOR HOUSTON TX 77010 (Tulsa Aircraft)	[X] Mail [ ] Hand Delivery [ ] Facsimile
GARY L COOPER ESQ COOPER & LARSEN 151 NORTH 3RD AVENUE STE 210 P O BOX 4229 POCATELLO ID 83205-4229 (Aircraft Cylinders)	[X] Mail [ ] Hand Delivery [ ] Facsimile

THOMSEN STEPHENS LAW OFFICES, P.L.L.C.

By: _____
Alan C. Stephens, Esq.

ACS:tr
4778\012 Brief